UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FLORIDA WILDLIFE FEDERATION, INC.; SIERRA CLUB, INC.; CONSERVANCY OF SOUTHWEST FLORIDA, INC.; ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA, INC.; AND ST. JOHNS RIVERKEEPER, INC.

CASE NO. 4:08-cv-00324-RH-WCS

Plaintiffs,

v.

LISA P. JACKSON, Administrator of the United States Environmental Protection Agency; and THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

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PLAINTIFFS' RESPONSE IN OPPOSITION TO EPA'S MOTION
FOR APPROVAL TO STAY PORTIONS OF EPA'S INLAND WATERS RULE

Florida Wildlife Federation, Inc., Sierra Club, Inc., St. Johns Riverkeeper, Inc., Conservancy of Southwest Florida, Inc., and Environmental Confederation of Southwest Florida, Inc. [the "Conservationists"] oppose EPA's motion (ECF Doc. No. 414) for an eleven month stay of the effective date of EPA's Florida Numeric Nutrient Criteria rules for lakes and springs. Those rules became effective last week, on January 6, 2013. EPA's motion should be denied because its stay proposal contravenes the Consent Decree.

THE COURSE OF EVENTS IN CONSENT DECREE IMPLEMENTATION

In 2008, the Conservationists listed above filed a Clean Water Act mandatory duty case contending that EPA in 1998 made a determination that numeric standards for nutrient pollution are necessary. During the course of that litigation, in early 2009 EPA issued a new formal Determination that numeric criteria for phosphorus, nitrogen, and responsive pollution parameters are necessary in Florida in order to comply with the Act. (ECF Doc. No. 57-7). The Determination paved the way for a settlement agreement that essentially codified it. When such a determination is made, the Act requires new standards to be promptly proposed and then finalized within 90 days. 33 U.S.C. § 1313(c)(4)(b). However, the agreement allowed EPA a much longer time to propose new standards – one year after the Determination for inland lakes and flowing waters (*i.e.,* lakes, springs, streams, rivers and canals) and two years after the Determination for estuarine and coastal waters. (ECF Doc. No. 153, pp. 4-5). Proposed rules were to be finalized 10 months after they were proposed. *Id*.

After considering spirited objections by many polluting industries and their allies in state government, this Court entered the Consent Decree at the end of 2009. (ECF Doc. No. 152). Since then, implementation has been repeatedly delayed. The Administrator sought and obtained extensions of the deadlines, sometimes with the plaintiffs' consent, and sometimes to allow the state more time to attempt to adopt its own numeric nutrient criteria. The order granting requested extensions over the Conservationists of May 30, 2012 [ECF Doc. No. 395] stated that EPA should expect no further extensions and yet another motion for extension was denied last month on December 3. (ECF Doc. No. 412).

Numeric nutrient rules for lakes, springs and inland flowing waters (other than South Florida canals) were finalized in November, 2010, and were the subject of rule challenges from a large number of industries, trade associations, and state and local government agencies. Those entities challenged all aspects of the rules, from the Determination to each individual component of each rule provision. In a lengthy order issued in February 2012, (ECF Doc. No. 351), this Court rejected those challenges as to the Determination, and to the lakes and springs standards but found technical defects in two rules. First, the Court found that although EPA had explained that the purpose of its numeric nutrient rules was to translate the state's narrative standard,[1] EPA had failed to explain how its method of setting numeric standards for flowing waters had a nexus to harm caused by imbalance. Second, the order found a technical defect in the downstream protective values that were needed to protect downstream waters with lower allowable nutrient concentrations from inflows from upstream water bodies with higher allowable concentrations. Both matters were remanded to EPA for correction by May 30, 2012. Over the Conservationists' objections, this court allowed EPA to extend the time for compliance with the remand order until August 31, 2012.[2]

The Consent Decree requires EPA to propose and adopt numeric nutrient standards unless it first approves such standards that are adopted by the Florida Department of Environmental Protection ["FDEP"]. In August, 2009, FDEP presented proposed rules to the Environmental Regulation Commission, the state regulatory commission that adopts water

[1] Florida's narrative standard reads: "In no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna." Rule 62-302.530(47)(b), F.A.C.

[2] For unstated reasons, the Conservationists subsequently agreed to an extension until November 30, 2012. (ECF Doc. No. 404).

quality standards. Those standards were formulated through a collaborative effort by scientists at EPA and FDEP, but were not pursued for reasons unexplained. Thus, when EPA proposed and finalized its numeric nutrient standards for springs, lakes, streams, rivers and canals outside of South Florida, they were almost the same as those proposed by FDEP in August 2009. (Chart and Excerpts of EPA and FDEP rules Attached as Exhibit 1).

With the fresh approach to environmental regulation that came at the end of 2010,[3] FDEP undertook rule-making for nutrient standards. In essence, FDEP adopted a very close variant of the EPA springs and lake criteria for phosphorus, nitrogen and chlorophyll in Florida. However, downstream lakes and estuaries are protected only by a narrative: "The loading of nutrients from a waterbody shall be limited as necessary to provide for the attainment and maintenance of water quality standards of downstream waters." *Compare* Rule 62-302.531(4), F.A.C. and 40 C.F.R. § 131.43(c)(2)(ii). As to flowing waters, the rules are spectacularly complex and allow regulatory action only after waterbody-specific studies of aquatic insects, emergent vegetation, algae and other floral growth. (FDEP Implementation Decision Matrix attached as Exhibit 2).

Two eleventh-hour amendments to the set of FDEP nutrient rules were proposed by representatives of polluting industries and then adopted by the Environmental Regulation Commission. (December 7, 2012 amendments to rule attached as Exhibit 3). First, the definition of "streams", Rule 62-302-200(36), F.A.C., was changed so as to exclude non-perennial streams, tidal creeks and altered streams and canals primarily used for water management (flood control, irrigation, etc.). (Exhibit 3, p. 127 of 146). Thus, the FDEP rules

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[3] *E.g.*, § 120.54(3), Fla. Stat. (requiring legislative ratification of agency rules with aggregate estimated compliance costs exceeding $1 million in their first five years).

apply to only 28 percent of the flowing waters outside of South Florida.[4] (ECF Doc. No. 410-1: EPA comparison of scope of coverage of EPA versus FDEP rule).[5] With the exclusion of all flowing waters in South Florida and the exclusion of 72 percent of flowing waters in the rest of the state, the FDEP rules apply to only a small fraction of the Florida waters for which EPA is required to promulgate numeric criteria under the Consent Decree.

Along with the streams amendment, the same lobbyists proposed an amendment that conditioned the effectiveness of all the new FDEP rules on repeal of EPA's numeric nutrient rules and on certification by EPA that they "sufficiently address" the January 2009 EPA Determination. Rule 62-302.531(9), F.A.C. The stated purpose of the proposed amendment was to prevent subsequent EPA numeric nutrient rules from "undermining the objectives" of the amendment changing the definition of "streams" described above. (Exhibit 3, p. 129 of 146). Those amendments were adopted and appear in 62-302.200(36), F.A.C. and 62-302.531(9), F.A.C. [6] Thus, the FDEP rules are ineffective unless EPA abnegates its obligations under the Consent Decree.

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[4] The FDEP rules do not apply to any flowing waters in South Florida. *See* Rule 62-302.531(2)(c), F.A.C. (nutrient threshold table).

[5] This excerpt was taken from a July 16, 2012 EPA assessment comparing the number of miles of flowing waters covered by EPA numeric criteria versus those waters covered by FDEP's rule. As Table 1 illustrates, EPA's numeric nutrient criteria applies to "59,673 miles" of "Inland Flowing Waters," whereas FDEP's rule applies to only "16,837 miles." (ECF Doc. No. 410-1, p. 3). Thus, the FDEP numeric nutrient criteria apply to only 28 percent of the waters covered by the EPA rule (16,837/59,673 = .2822). The 201 miles entry in the next column to the right is not material because it would increase the percentage to 28.5 percent. This calculation considers only the fraction of inland waters outside of South Florida that are covered by the FDEP rule because the EPA rule does not apply to South Florida.

[6] The rule reads in relevant part:

> . . . these rules shall be effective only if EPA approves these rules in their entirety, concludes rulemaking that removes federal numeric nutrient criteria in response to the approval, and determines, in accordance with 33 U.S.C. §

During the summer of 2012,[7] EPA and FDEP negotiated an extensive set of requirements to supplement the FDEP rule that would make the FDEP rules "approvable" by EPA. That 48 page set of additional requirements was published on the FDEP website as a document titled "Implementation of Florida's Numeric Nutrient Standards."[8] However, this new set of requirements cannot be utilized unless FDEP adopts it as a rule under Florida Statutes section 120.54 *et seq. See, e.g. Department of Revenue of State of Fla. v. Vanjaria Enterprises, Inc.*, 675 So.2d 252 (Fla. 5th DCA 1996) (method for assessing taxes set forth in Department of Revenue training manual was illicit rule that was unenforceable absent promulgation). It could also require legislative ratification under section 120.54(3), Florida Statutes. The failure of FDEP to adopt its negotiated implementation requirements as an administrative rule is the subject of an ongoing rule challenge in the Florida Division of Administrative Hearings.[9]

On November 21, 2012, EPA sought to postpone compliance with this Court's remand order concerning inland flowing waters and Downstream Protective Values as well as its obligation to propose numeric nutrient criteria for all flowing waters in South Florida, all Florida

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1313(c)(3), that these rules sufficiently address EPA's January 15, 2009 determination.

Rule 62-302.531(9), F.A.C.

[7] The FDEP proposed rule and its existing narrative imbalance standard were upheld in a state administrative challenge by the Conservationists in the Florida Division of Administrative Hearings. http://www.doah.state.fl.us/ROS/2011/11006137.pdf That order is under appeal, with the main issues being the finding that major toxic algae outbreaks are not an "imbalance" because they are natural phenomenon, the exclusion of Department of Health reports describing the gravity and scope of the threat posed by toxic algae outbreaks, and the exclusion of evidence showing contamination of drinking water sources by toxic algae outbreaks.

[8] http://www.dep.state.fl.us/water/wqssp/nutrients/

[9] *See* http://www.doah.state.fl.us/DocDoc/2012/003605/12003605_0_11062012_11100903_e.pdf, http://www.doah.state.fl.us/DocDoc/2012/003605/12003605_0_01022013_02540314_e.pdf, and http://www.doah.state.fl.us/DocDoc/2012/003605/12003605OA-010213-15132613.pdf.

estuaries, and all coastal waters. That request for a last minute extension was denied. (ECF Doc. No. 412). Thus, EPA published revised Downstream Protective Value rules,[10] and inland flowing waters outside of South Florida,[11] 77 Fed. Reg. 74985, and proposed numeric nutrient criteria for 89 segments of estuary and coastal waters and all South Florida canals. 77 Fed. Reg. 74924. For waters in the Everglades Agricultural Area and the Everglades Protection Area, no nutrient criteria are proposed. (ECF Doc. No. 413-1, p. 2; 77 Fed. Reg. 74984).

On December 10, 2012, EPA filed with this Court two letters directed to FDEP – one from EPA Region IV and one from EPA's Assistant Administrator for Water in Washington, D.C. (ECF Doc. Nos. 413-1; 413-2). The Region IV letter approves the FDEP rules, and addresses the problem that the FDEP rules are ineffective until EPA abnegates its duties under the Consent Decree by concluding that "the provisions of Rule 62-302.531(9), F.A.C. are not triggered." (ECF Doc. No. 413-1, p. 3). Although EPA's study found that 72 percent of flowing waters were excluded by the FDEP definition, Region IV concluded that all flowing waters are subject to the new FDEP rules absent proof that a particular flowing water is excluded by the definition of "streams" in Rule 62-303.200(36):

> It is our understanding that FDEP's numeric water quality criteria apply to all Class I and/or III flowing waters unless and until FDEP makes an affirmative determination that a particular water body meets one of the exclusions under F.A.C. 62-302.200(36), i.e., it is a tidally influenced segment, non-perennial stream, or an actively maintained conveyance, such as a canal or ditch.

(ECF Doc. No. 413-1, p. 2).

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[10] EPA proposes four alternate methods of establishing numeric downstream protective values, indicating which ones are most robust. 77 Fed. Reg. at pp. 74999-74501.

[11] EPA responded to this Court's remand order concerning the scientific rationale for its flowing waters rule by re-noticing the identical provisions of 40 C.F.R. § 131.43 relating to flowing waters but including in the preamble a more extensive scientific explanation for them. 77 Fed. Reg. at pp. 74992-99.

As to the problems described above, Region IV made it its approval subject to

> . . . FDEP being able to implement their rule consistent with their Implementation Document and other supporting documents submitted to the EPA by FDEP; interpretation of F.A.C. 62-302.531(9) to allow the EPA to propose and if necessary promulgate NNC for the waters not covered by FDEP's rule; and, with respect to FDEP's downstream protection approach, to the district court modifying the Consent Decree to not require numeric criteria to protect downstream waters (as described above). As a result, the EPA reserves its authority to revisit this approval decision in the future and to modify or withdraw it, as appropriate.

(ECF Doc. No. 413-1, p.3).

The letter from the Assistant EPA Administrator for Water amends the January 2009 Determination to eliminate the requirement of numeric Downstream Protective Values on the theory that the FDEP rules are sufficient in that they are "quantitative." (ECF Doc. No. 413-2, p. 4). It also acknowledges that this change requires an amendment to the Consent Decree. *Id. See also* ECF Doc. No. 413-1, p. 3. To date, no motion to modify the Consent Decree has been filed by EPA.

ARGUMENT

I. EPA Cannot Justify a Stay of the Enforceability of Its Rules Because of Its Hope That Florida Will Adopt a New Set of Rules.

The Consent Decree was entered because of EPA's delay in adopting numeric nutrient standards. Having made a formal Determination under 42 U.S.C. § 1313(c)(4)(B), that a new water quality standard is necessary, EPA is statutorily required to promptly publish proposed regulations and promulgate them 90 days after publication. In recognition that a longer rule development period provided a practical means to settle the case and thereby advance the rule-making process, this Court approved a schedule in the Consent Decree that lengthened these timeframes, all of which deadlines are now long past. As this Court observed in its December 3,

2012 Order Denying An Extension of Consent Decree Deadlines, EPA's need to discuss DEP's "tentative plans" to adopt criteria not covered by DEP's earlier proposals was "too slender a reed on which to base another extension of deadlines that have already been long delayed." [ECF Doc. No. 412].

EPA now offers the same excuse for extending the effective date of its final numeric nutrient criteria which became effective January 6, 2013. In essence, EPA's argument is that the Clean Water Act and the Consent Decree allow it to postpone the effective date of its numeric nutrient rules in the hope that FDEP will adopt new rules. EPA is wrong on both points. The purpose of section 1313 of the Clean Water Act is to expeditiously put in place standards to protect the quality of the nation's waters whenever state standards fail to comply with the requirements of the Clean Water Act. Developing but then failing to implement standards wholly fails to satisfy this statutory mandate. The Clean Water Act provides no excuse for delay based on consultation with states. In *Raymond Proffitt Foundation v. U.S. E.P.A.*, 930 F. Supp. 1088, 1098 (E.D. Pa. 1996), the court held that a state's ongoing rulemaking process was neither an exemption nor an excuse for EPA to put off its section 1313(c) mandatory duties. This Court can and should hold likewise.

The Consent Decree similarly requires that the standards become effective. The Consent Decree in this case requires EPA to finalize federal numeric nutrient water quality standards for all Florida flowing waters unless the State of Florida submits "and EPA has approved such standards pursuant to section 303(c)(3) of the Clean Water Act." (ECF Doc. No. 153, p. 4). This Court rejected legal challenges to the rules at issue and they went into effect January 6, 2013. Although EPA purports to approve DEP's rule in its "entirety" to replace the federal rule, that

"approval" is explicitly "subject to" a number of conditions, including, *inter alia*: (1) FDEP being able to implement the state rule consistent with its newly-minted "Implementation Document"; (2) DEP clarifying the so-called "all-or-nothing" provision of the rule, Fla. Admin. Code R. 62-302.531(9), to allow FDEP to establish numeric criteria for the nearly 45,000 miles of Florida flowing waters expressly exempted by the state rule; and (3) this Court granting EPA's future motion to amend the Consent Decree so as not to require numeric criteria to protect downstream waters. (ECF Doc. No. 413-3, p. 3). Moreover, EPA expressly "reserves its authority to revisit this approval decision" if these "contingencies" do not come to pass" (ECF Doc. No. 413-3, p. 3). EPA's letter is an illegal "conditional approval" that fails to satisfy the requirements of the Consent Decree.

EPA should not be prejudiced if its motion is denied. EPA has known for three years – since the Consent Decree was entered – that it could be responsible for establishing effective numeric nutrient criteria for the State of Florida. EPA is already promulgating most TMDLs for Florida waters pursuant to a 1998 Consent Decree. *Florida Wildlife Federation v. Jackson*, United States District Court for the Northern District of Florida, Case No. 4:98CV356-WS. When the numeric nutrient rules were finalized in late 2010 (ECF Doc. 192), their effective date was initially postponed for 15 months so that affected parties could prepare plans for compliance. 75 Fed. Reg. 75762. That 15 months ended in March 2012, over 10 months ago.

II. EPA's Arguments In Support of Its Motion Contravene the Clean Water Act and the Consent Decree.

EPA's arguments are based on its approval letters relating to the FDEP rules. A careful examination of those arguments reveals that EPA's efforts to avoid compliance with the Consent

Decree contravene the requirements of the Clean Water Act approval requirements, disregard the plain meaning of the FDEP rules, and are dependent on this Court's approval of a motion to amend the Consent Decree that has yet to be filed. Taken together, these arguments actually support the arguments for keeping in place effective and enforceable numeric nutrient criteria.

A. EPA's Approval Letter is *Ultra Vires*

The plain language of the Clean Water Act shows that EPA's issuance of a conditional approval is *ultra vires*. The Clean Air Act provides for conditional approvals of state submittal of implementation plans for national ambient air quality standards:

> (4) Conditional approval
> The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

See 42 U.S.C. § 7410(k)(4). The Clean Water Act does not.

> If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this Act, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this Act, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

33 U.S.C. 1313(c)(3); *see also* 33 C.F.R. § 131 ("Under section 303(c) of the Act, EPA is to review and to approve or disapprove State-adopted water quality standards.")

Where Congress includes particular language in one statute but omits it from another, the Court should "presume[] that Congress act[ed] intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (2005). Indeed, the Eleventh

Circuit recently held that "it is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Friends of the Everglades v. U.S. E.P.A*. 699 F.3d 1280, 1286 (11th Cir. 2012) (rejecting EPA argument that circuit court rather than district court had jurisdiction over challenge to EPA rulemaking because Clean Water Act's plain language gave circuit courts' jurisdiction over only specific enumerated actions and actions "related to" or "functionally similar" to the specific actions were not on list).

B. The "Effectiveness" of the State Rules.

It is plain from the text of the FDEP rules that they are not effective unless EPA formally determines that those rules entirely satisfy the requirements of the 2009 Determination. Thus the FDEP rules are effective only if EPA refuses to comply with the Consent Decree. Rule 62-302.531(9), F.A.C. In the face of this provision, EPA claims to be unsure of its meaning and seeks "clarification" from FDEP as to whether this provision renders FDEP's rules ineffective in the event that EPA elects to comply with the Consent Decree. No flowing waters in South Florida and only about a quarter of the flowing waters elsewhere are even subject to the FDEP rule. EPA seeks to avoid this conclusion through the imaginative but untenable theory that 100 percent of Class I and Class III flowing waters are covered by the FDEP rule because FDEP presumes that all streams fall within its streams definition until proven otherwise. In any event, EPA cannot rely on any such post-hoc explanation to justify its approval. *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 493-94 (6th Cir. 2008) (EPA's approval of anti-degradation exemption for coal mining discharges which relied on state's informal commitment to subject

such discharges to socio-economic review violated federal approval process); *Miccosukee Tribe of Indians of Florida v. U.S.* , 2008 WL 2967654, 31, n.60 (S.D. Fla. 2008) (rejecting EPA's attempt to rely on post-hoc letter interpretation from DEP that rule provision stating that DEP "shall not require WQBELs through 2016" did not mean what it said and would apply only for a particular permit.")

The Consent Decree inescapably requires EPA rules. EPA's assertion that it does not understand the "all or nothing" provision set out in Rule 62-302.531(9), F.A.C. is untenable. Indeed, EPA is obliged by its own regulations to independently evaluate the effect and meaning of this provision *prior to* approval of the rule. 40 C.F.R. § 131.13 (policies included in state standards that generally affect the standards' implementation must be reviewed and approved by EPA). EPA's failure to comply is critical because EPA lacks the authority to approve a state rule that cannot take effect without EPA breaching a Consent Decree. And a state rule that cannot take effect can not displace a federal rule on the same subject. 40 C.F.R. § 131.21(c).

C. EPA Cannot Condition Approval of the FDEP Rule on the Potential for A Successful Motion to Amend the Consent Decree to Eliminate the Requirement for Numeric Downstream Protective Values

EPA argued persuasively in its summary judgment motion that numeric Downstream Protective Values are both necessary and feasible (ECF Doc. No. 300, pp. 120-23). This Court agreed. (ECF Doc. No. 351, pp. 67-70). Now EPA asks this Court to accept an approval letter from EPA that is conditioned on this Court granting a motion to amend the Consent Decree that has not even been filed. EPA letters that assume that uncertain future contingencies will come to pass is not a sufficient basis to delay the effective date of the numeric nutrient rules.

For these reasons, the Conservationists respectfully request that this Court enter an order denying EPA's motion.

RESPECTFULLY SUBMITTED this 14th day of January, 2013.

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/s/ Monica K. Reimer
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court using CM/ECF on this 14th day of January, 2013 and was electronically served via CM/ECF on counsel for all parties of record.

/s/ Monica K. Reimer